

March 13, 2012

Scott Kernan
P O Box 22819
Sacramento, CA 95822

Re: Your Request for Informal Assistance
Our File No. I-12-017

Dear Mr. Kernan:

This letter responds to your request for advice regarding the revolving door provisions of the Political Reform Act (the “Act”).¹ This letter should not be construed as assistance on any conduct that may have already taken place. (See Regulation 18329(b)(8)(A).) In addition, this letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Because your question is general in nature, we are treating your request as one for informal assistance.²

Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other laws that may apply including, but not limited to, the post-employment provisions of Public Contract Code Section 10411; other conflict-of-interest laws such as common law conflict of interest, Government Code Section 1090, and Public Contract Code Section 10410; or laws regarding incompatible activities such as Government Code Section 19990.

QUESTION

As the former Undersecretary for the Department of Corrections and Rehabilitations (the “CDCR”) with executive level oversight of the department’ Strategic Offender Management System (the “SOMS”), do the Act’s revolving door provision prohibit you from assisting Hewlett

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

Packard ("HP") as a private consultant in light of the fact that HP is the prime vendor responsible for managing the SOMS?

CONCLUSION

As the executive officer specifically responsible for the oversight of the Strategic Management System, you are *permanently* prohibited from making an appearance or communication -- and from *aiding, advising, counseling, consulting, or assisting* any person, including any employee of HP, in making an appearance or communication -- for compensation, in a proceeding before any state administrative agency regarding the management of the SOMS contract between HP and the CDCR.

Additionally, you are prohibited from making an appearance or communication before CDCR, or any employee of CDCR, for compensation, on behalf of another person for one year from the date you left state service if that contact is made for the purpose of influencing an administrative or legislative action or any discretionary act involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. If you return to a retired annuitant position that is, or should be, designated in the CDCR's conflict-of-interest code, the one-year ban will begin anew upon permanently leaving the retired annuitant position. Moreover, should you return to the CDCR as expected, your actions as a private consultant simultaneously employed by the CDCR will be restricted under the Act's conflict-of-interest provisions -- as well as any other law outside the Act that may apply.

FACTS

You are a former public official who retired from your exempt position of Undersecretary in the Department of Corrections and Rehabilitation (the "CDCR") on March 30, 2011. You were appointed to this position by former Governor Schwarzenegger and confirmed by the Senate in 2007. More recently, you have sought and expect to obtain from the Secretary of State a license to conduct business as Kernan Consulting, LLC. As a private consultant you are contemplating employment with several companies including Hewlett Packard ("HP").

As a policy maker for the CDCR, you were involved in hundreds of inmate initiated lawsuits and expect to continue work with the state as a retired annuitant and witness for the state. In addition, as the former Undersecretary for the CDCR, you provided executive level oversight of a large IT procurement for the CDCR, and managed by HP as the prime vendor, known as the Strategic Offender Management System (the "SOMS").

If you accept employment as a consultant for HP, you anticipate assisting HP in business development at national and local levels and leveraging your experience with SOMS to market SOMS-like solutions to law enforcement groups other than the CDCR including, but not limited to, sheriffs, board of supervisors, probation chiefs, chiefs of police, the Governor's office, and

the Legislature. You also anticipate providing advice and developing strategies for HP officials to manage contracts with the state including the SOMS contract between HP and the CDCR.

ANALYSIS

Under the Act, public officials who leave state service are subject to two types of post-governmental employment provisions known as the permanent and one-year bans. In addition, Section 87407 prohibits certain state and local officials from making, participating in making, or using their official position to influence decisions affecting persons with whom they are negotiating employment or have any arrangement concerning employment. (See Regulation 18747.)³ Colloquially, these provisions are known as the “revolving door” prohibitions.

Permanent Ban

The “permanent ban” prohibits a former state employee from “switching sides” and participating, for compensation, in any specific proceeding involving the State of California or assisting others in the proceeding if the proceeding is one in which the former state employee participated while employed by the state. (Sections 87401 and 87402; Regulation 18741.1.) The permanent ban applies when an official has permanently left or takes a leave of absence from any particular office or employment. (Regulation 18741.1(a)(1).)⁴

The permanent ban is a lifetime ban and applies to any formal or informal appearance or any oral or written communication--or aiding, advising, counseling, consulting, or assisting in representing any other person, other than the State of California, in an appearance or communication--made with the intent to influence any judicial, quasi-judicial, or other proceeding in which you participated while you served as a state administrative official. “‘Judicial, quasi-judicial or other proceeding’ means any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency” (Section 87400(c).) An official is considered to have “participated” in a proceeding if he or she took part in the proceeding “personally, and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation, or use of confidential information” (Section 87400(d).)

³ You are currently retired from the CDCR. Thus, we are not providing advice pertaining to Section 87407 at this time. However, if you return as retired annuitant to the CDCR as expected, we note that Section 87407 would prohibit you from making, participating in making, or using your position to influence any decision by the CDCR that would affect a prospective employer. If you need additional assistance regarding Section 87407 upon returning to work with the CDCR, you should seek further advice.

⁴ For purposes of the permanent ban, “[t]he date on which an official permanently leaves office or employment or takes a leave of absence is the date on which the official is no longer authorized to perform the duties of the office or employment, and the official stops performing those duties, even if the official continues to receive compensation for accrued leave credits.” (Regulation 18746.4(a)(1).)

As the former Undersecretary for the CDCR, you are a former state employee subject to the permanent ban. Accordingly, you are prohibited from making an appearance or communication, or from assisting any other person in making an appearance or communication, before any state administrative agency, for compensation, in a quasi-judicial proceeding, such as a proceeding by HP regarding its SOMS contract with the CDCR, if you previously participated in the proceeding as a state official.

Based upon the information you have provided, you were previously responsible for the executive level oversight of the SOMS. Under Regulation 18741.1, a 'supervisor is deemed to have participated in any proceeding that was 'pending before' ... the official's agency and that was under his or her 'supervisory authority'' A proceeding is under a supervisor's "supervisory authority" if the supervisor:

"(A) Has duties that include primary responsibility within the agency for directing the operation or function of the program where the proceeding is initiated or conducted; or

"(B) Has direct supervision of the person performing the investigation, review, or other action involved in the proceeding including, but not limited to, assigning the matter for which the required conduct is taken; or

"(C) Reviews, discusses, or authorizes any action in the proceeding; or

"(D) Has any contact with any of the participants in the proceeding regarding the subject of the proceeding."

As the executive officer specifically responsible for the oversight of the SOMS, proceedings regarding the SOMS were under your supervisory authority, and you have therefore previously participated in the proceedings for purposes of the Act's permanent ban. You are *permanently* prohibited from making an appearance or communication -- and from *aiding, advising, counseling, consulting, or assisting* any person, including any employee of HP, in making an appearance or communication -- for compensation, in a proceeding before any state administrative agency regarding the management of the SOMS contract between HP and the CDCR.

Nonetheless, [t]he permanent ban does not apply to a "new" proceeding even in cases where the new proceeding is related to or grows out of a prior proceeding in which the official had participated. A "new" proceeding not subject to the permanent ban typically involves different parties, a different subject matter, or different factual issues from those considered in previous proceedings." (*Rist* Advice Letter, No. A-04-187; also see *Donovan* Advice Letter, No. I-03-119.) New contracts with the employee's former agency in which the former employee did not participate are considered new proceedings. (*Leslie* Advice Letter, No. I-89-649.) A new contract is one that is based on new consideration and new terms, even if it involves the same parties. (*Ferber* Advice Letter, No. I-99-104; *Anderson* Advice Letter, No. A-98-159.) In

addition, the application, drafting, and awarding of a contract, license, or approval is considered to be a proceeding separate from the monitoring and performance of the contract, license, or approval. (*Anderson, supra*; *Blonien* Advice Letter, No. A-89-463.)

Based upon the facts you have provided, marketing SOMS like solutions to other law enforcement agencies, other than the CDCR, would be new proceedings. Accordingly, your participation in these proceedings, or any other proceedings in which you did not previously participate as an employee of the CDCR, is not prohibited under the permanent ban, although the one-year ban may still apply.

One-Year Ban

The “one-year ban” prohibits a former state employee from making, for compensation, any formal or informal appearance, or making any oral or written communication, before his or her former agency for the purpose of influencing any administrative or legislative actions⁵ or any discretionary act involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. (See Section 87406; Regulation 18746.1.)

The one-year ban applies to any employee of a state administrative agency who holds a position that is designated or should be designated in the agency’s conflict-of-interest code. (Section 87406(d)(1); Regulation 18746.1(a)(2).)⁶ The ban applies for twelve months from the date the employee permanently leaves state office or employment.⁷ While in effect, the one-year ban applies only when a former employee or official is being compensated for his or her

⁵ For purposes of Section 87406, the Act defines “administrative action” and “legislative action” as the following:

“‘Administrative action’ means the proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, regulation, or other action in any ratemaking proceeding or any quasi-legislative proceeding . . .” (Section 82002(a).)

“‘Legislative action’ means the drafting, introduction, consideration, modification, enactment or defeat of any bill, resolution, amendment, report, nomination or other matter by the Legislature or by either house or any committee, subcommittee, joint or select committee thereof, or by a member or employee of the Legislature acting in his official capacity. ‘Legislative action’ also means the action of the Governor in approving or vetoing any bill.” (Section 82037.)

⁶ A governmental employee should be designated in his or her agency’s conflict-of-interest code if the employee makes or participates in making governmental decisions that have a reasonably foreseeable material effect on any financial interest. (Section 87302.)

⁷ For purposes of the one-year ban, the date on which an official permanently leaves office or employment is the date on which the official is no longer authorized to perform the duties of that office or employment, and stops performing those duties. A person shall not be deemed to have left office permanently because he or she is on a leave of absence or serves as an intermittent employee. However, a person shall be deemed to have left office permanently if the person merely receives compensation for accrued leave credits. (Regulation 18746.4(b).)

appearances or communications before his or her former agency on behalf of any person as an agent, attorney, or representative of that person. (Regulation 18746.1(b)(3) and (4).)

In contrast to the permanent ban, which only applies to “judicial or quasi-judicial” proceedings, the one-year ban applies to “any appearance or communication made for the purpose of influencing administrative or legislative action or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.” (Regulation 18746.1(b)(5).) An appearance or communication is for the “purpose of influencing” if it is made for the “principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding.” (Regulation 18746.2.) An appearance or communication includes, but is not limited to, conversing by telephone or in person, corresponding in writing or by electronic transmission, attending a meeting, and delivering or sending any communication. (*Id.*)

Finally, appearances and communications are prohibited only if they are (1) before a state agency that the public official worked for or represented; (2) before a state agency “which budget, personnel, and other operations” are subject to the control of a state agency the public official worked for or represented; or (3) before any state agency subject to the direction and control of the Governor, if the official was a designated employee of the Governor’s office during the twelve months before leaving state office or employment. (Regulation 18746.1(b)(6).)

While you have not specified whether your position as Undersecretary for the CDCR is a position designated in the CDCR’s conflict-of-interest code, at a minimum, the position should be designated, and your post-employment actions are restricted under the one-year ban for 12 months from the date you permanently left the CDCR. Based upon the facts you have provided, you retired on March 30, 2011. Assuming you do not return to work with the CDCR, the one year-ban would expire on March 30, 2012.

However, you have indicated that you expect to return to work with the CDCR as a retired annuitant. Should you return to the CDCR as expected, your actions as a private consultant while simultaneously employed by the CDCR will be restricted under the Act’s conflict-of-interest provisions.⁸ Moreover, if you return to a retired annuitant position that is, or should be, designated in the CDCR’s conflict-of-interest code, the one-year ban will begin anew upon permanently leaving the retired annuitant position.

⁸ Pursuant to Section 87100, a public official is prohibited from making, participating in making, or using his official position to influence a governmental decision in which he has a financial interest. A public official has a “financial interest” in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of the public official’s economic interests. (Section 87103; Regulation 18700(a).) If you need additional assistance regarding the conflict-of-interest provisions upon returning to work with the CDCR, you should you seek further advice.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Brian G. Lau
Counsel, Legal Division

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